127a. Early Islamic law scholars "eventually coalesced into a number of guilds, four of which survive in modern times: . . . the Hanbali, Hanafi, Shafi'i and Maliki." Pet. App. 176a. "Saudi Arabia has instructed judges to rule in accordance with the teachings of the Hanbali guild." Pet. App. 180a. SABIC's expert, Frank Vogel, agreed that "Saudi judges" will "hew conservatively" to the Hanbali school. Del. App. B0059.

Importantly, "Islamic law resists the common-law concepts of binding precedent and *stare decisis*," Pet. App. 180a; indeed, "judicial decisions are not in themselves a source of law," and with minor exceptions, "court decisions in Saudi Arabia are not published or even open to public inspection." Pet. App. 139a. What predominates, then, in determining a question of Saudi law, is the "study and analysis,"—or *ijtihad*—that a trial judge brings to bear in each particular case, or in other words, whether "the proper analytical procedures are followed in reaching the results." Pet. App. 177a.[2]

In discerning the law applicable to a particular case, "the judge will have to, first and last, . . . navigate within the boundaries" of the Hanbali school's "authoritative works." Del. App. B0057. These scholarly treatises "are the primary works consulted by Saudi judges." Pet. App. 139a. Using these scholarly writings as guides, Saudi judges identify "a spectrum of possibilities on any given question, rather than a single 'correct' answer." Pet. App. 178a.

Recognizing the challenge inherent in applying the governing Saudi law, the trial court took full advantage of the discretion afforded by Delaware procedural rules for deter-

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[2] See also FRANK E. VOGEL, ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA 100-101 (2000) (describing "the rule against *ijtihad* reversal" in Saudi appellate practice, which "bars appellate courts from reversing matters of legitimate discretion, or *ijtihad*, not only as to the facts but also as to law").

mining foreign law by reference to any relevant material available to it. The court gave the parties full opportunity to submit materials to help the court interpret Saudi law. Before trial, it received seven reports from four different Saudi-law experts—Vogel and Mohammed Al-Zubair[3] for SABIC, and Wael Hallaq and Ziad Al-Sudairy for ExxonMobil—and lengthy depositions of each expert. Del. App. B0041-B0042. Additionally, the court retained an independent expert, Herbert Wolfson, who prepared an initial report, traveled to Saudi Arabia to conduct additional research, prepared a supplemental report, and was also deposed for a full day. Pet. App. 91a, 169a-233a. After reviewing the nine reports and more than a thousand deposition pages, the trial court held a day-long hearing to receive live testimony from Vogel, Hallaq, and Wolfson. At the hearing, SABIC's counsel resisted the court's consideration of additional treatises on Saudi law, successfully urging that "nothing new gets added. We don't reinforce, we don't put in anything new." Tr. of Mar. 7, 2003 Hearing 85. Despite its comprehensive pretrial endeavor and SABIC's pretrial effort to limit the record, the trial court permitted SABIC to supplement its Saudi-law presentation with two additional, posttrial reports by Vogel. Pet. App. 235a-254a, 271a-298a.

After considering all of the evidence of Saudi law presented by the experts in their testimony and reports, the trial court determined that ExxonMobil could prevail on its usurpation claim only by showing: (1) the exercise of ownership or possessory rights, (2) over the property of another, (3) that

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[3] Al-Zubair initially opined on an issue related to Saudi limitations law, but SABIC had to withdraw that opinion –and a portion of Al-Zubair's report, his deposition testimony, and certain of SABIC's statute of limitations arguments– after ExxonMobil's rebuttal expert demonstrated Al-Zubair's opinions to be wholly inaccurate. Del. App. B0037. SABIC ultimately elected not to present Al-Zubair as a witness at the pretrial Saudi law hearing.

was done without consent, and (4) wrongfully. Pet. App. 47a. The court further elaborated on the "without consent" element by requiring a showing of a "blatant or reckless disregard" of the property rights of another. *Ibid.*

SABIC does not dispute the Delaware jury's findings that its conduct satisfied each of those elements, but urges that the trial court should have included additional elements in the definition of usurpation: "openness, notoriety, force, aggression and injustice." Pet. 12. SABIC also argues that disgorgement of the profits SABIC usurped in connection with its overcharges is not an available remedy. Pet. 13. But those contentions are not federal issues, nor are they supported by the extensive compilation of Saudi-law material in the trial record, which established that the "openness" element does not appear in the authoritative Hanbali works and that the Hanbali works do support recovery of usurped profits.

SABIC's asserted "openness" (in Arabic, *jahran*) element is nowhere found in the Hanbali school to which, all the experts agreed, Saudi courts must conservatively hew. Wolfson noted that "the most influential Hanbali scholars, whose works enjoy tremendous respect in Saudi Arabia" do not "include openness or notoriety as elements in the definition of *ghasb*." Pet. App. 193a; see also Del. App. B0068-B0069 ("[I]n the classical Hanbali sources there is no element of open and notorious in the tort of usurpation.").[4] Even Vogel conceded, repeatedly, that "the Hanbali scholars . . . don't include [open and obvious] in their definition of usurpation." Del. App. B0062; see also Del. App. B0063 ("[J]ahran doesn't appear in the Hanbali scholars."); Del. App. B0065 ("[J]ahran does not appear in the Hanbali text."). Indeed,

[4] Wolfson's articulation of an "open and notorious" element, which he later recharacterized as "lack of secrecy," are premised on writings from the Hanafi school, not the governing Hanbali school. Pet. App. 193a, 221a.

Vogel agreed that even if the victim is completely unaware that a taking has occurred, the taking qualifies as usurpation:

> "Q. Now suppose, just suppose, I have a bunch of horses, okay? . . . And you come into my corral and take one of my horses, but I'm in Brazil. . . . So I have no idea that you have in fact taken my horses. . . . And, indeed, when I come back, I don't know that the horse is gone? . . . That would be usurpation, too, wouldn't it?
>
> A. Yes." Pet. App. 49a.[5]

After his client lost at trial, Vogel changed his opinion on the elements of usurpation, but the very few citations in his posttrial opinions are not from the classical Hanbali works that he previously conceded are the "authoritative" and "primary works" Saudi judges would consult, but rather from "Lebanese and Egyptian scholars who drew on the respective legal traditions of their countries, namely, the Hanafi and in part Shafi'i schools." Pet. App. 260a.

The Saudi-law experts ultimately agreed not only on the Hanbali elements of usurpation, but also that the available compensatory damages include a return of the actual over-charged amounts plus the actual past profits obtained by SABIC's wrongful use of the overcharged amounts in its own business operations. See Pet. App. 130a; Del. App. B0066. Wolfson agreed that these compensatory damages find "solid support" in "the Hanbali treatises." Del. App. B0070. And SABIC's own expert, Vogel, explained "the Hanbalis have made a point of . . . trying to pursue that usurper for all conceivable profits." Del. App. B0066.

Despite the extensive opportunities to provide Saudi-law material in the trial court, SABIC waited until the adverse jury verdict was pending on appeal before procuring from a

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[5] Indeed, Wolfson identified the horse example as "one of the hypotheticals that is discussed in the classical sources." Del. App. B0068.

functionary in the Saudi Ministry of Justice an anonymous "study" criticizing the superior court's interpretation of Saudi law. Calling the study an "official statement" of the Saudi government, SABIC relied on DEL. R. EVID. 202(e) to attempt to slip the study into the appellate record, arguing that it was within the Delaware Supreme Court's discretion, under Delaware procedural and evidentiary rules, to accept it to "aid [that] Court in its determination of Saudi law on appeal." Pet. App. 99a, 101a. The Delaware Supreme Court held that, under Delaware rules, SABIC's unauthenticated study was untimely and submitted in a procedurally improper fashion, and the court denied SABIC's motion for its acceptance. Pet. App. 61a, 91a-92a. At no point in the process did either the Ministry or the Kingdom communicate with the court by amicus curiae submission or by any other means. The court affirmed the judgment against SABIC on all grounds and denied SABIC's motion for reargument. Pet. App. 1a-60a, 89a-93a. The judgment has been fully satisfied.

REASONS FOR DENYING THE PETITION

In affirming the judgment of the superior court, the Delaware Supreme Court conducted a thorough de novo review of all Saudi-law issues, as Delaware law required, and found that the superior court in its careful and comprehensive analysis had correctly evaluated Saudi law. SABIC asserted a lengthy laundry list of asserted errors before the Delaware Supreme Court, all of which the court correctly rejected. But SABIC never preserved the only question it now attempts to present for this Court's review, having never proposed the federal common-law rule it now asserts. Because SABIC never raised that federal question, the Delaware Supreme Court's refusal to accept its unauthenticated study and that court's ultimate affirmance of the trial-court judgment rested purely on state-law grounds and cannot form the basis for any conflict with federal law. Moreover, no federal policy can be discerned that would conflict with Delaware's practice in

determining foreign law because Delaware, like other federal and state jurisdictions, has adopted a flexible, discretionary approach to the determination of foreign law. There is no conflict, in any event, because not a single state or federal court has ever adopted the untenable second-bite rule that SABIC attempts to characterize as federal common law. The petition should be denied.

I. BECAUSE SABIC'S MOTIONS WERE SUBMITTED AND DECIDED ON STATE-LAW GROUNDS, THE QUESTION SABIC PRESENTS WAS NOT PRESERVED AND CONTAINS NO FEDERAL QUESTION.

SABIC never argued to the Delaware courts, and those courts therefore did not decide, the only question presented in its petition. Never, until now, has SABIC argued that federal common law requires a state court to receive and defer to a purported statement by a foreign sovereign regarding the substance of its law. The Court ordinarily "do[es] not decide questions neither raised nor resolved below." *Glover* v. *United States*, 531 U.S. 198, 205 (2001); accord, *e.g.*, *TRW Inc.* v. *Andrews*, 534 U.S. 19, 34 (2001); *Nat'l Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999).

SABIC did not—as it now asserts it did—argue to the Delaware Supreme Court that federal common law required the court to accept and consider an "official statement." Rather, SABIC argued only that the State's own rules gave the court discretion to permit SABIC's filing. Pet. App. 105a-106a. Lacking Delaware authority to support its attempt to supplement the evidentiary record on appeal, SABIC instead cited a handful of federal cases to suggest that the Delaware Supreme Court had discretion under DEL. R. EVID. 202(e), the Delaware state-law analogue to federal rule 44.1,[6] to supplement the appellate record with SABIC's late-filed

[6] Rule 202(e) is essentially identical to, and supersedes, DEL. SUPER. CT. R. 44.1, which itself is based on FED. R. CIV. P. 44.1.

study. Pet. App. 101a-102a (citing federal cases); Pet. App. 105a (asserting that the court "*may* consider" the study (emphasis added)). In justifying its reliance on federal case law, SABIC noted that the federal rule regarding determinations of foreign law "is virtually identical to" the Delaware rules, Pet. App. 101a, but, again, never even suggested that case law interpreting rule 44.1 creates federal common law binding on Delaware courts.

The closest SABIC ever came to the argument it attempts to articulate now was an indeterminate reference to "international comity" in its motion for reargument. Pet. App. 97a. That passing mention of comity principles hardly suffices to preserve the federal common-law question SABIC now presents for the Court's review. See *Glover*, 531 U.S., at 205; *Nat'l Collegiate Athletic Ass'n*, 525 U.S., at 470. SABIC's question presented was therefore not preserved in the Delaware courts, and the petition must be denied on that basis alone.

Moveover, because SABIC never presented its asserted federal issue to the Delaware Supreme Court, that court never undertook to decide any federal issues and denied SABIC's motions entirely on independent state-law grounds, thus depriving the Court of jurisdiction over SABIC's petition. *E.g.*, *Dretke* v. *Haley*, 541 U.S. 386, 392 (2004) ("[A]n adequate and independent state procedural disposition strips this Court of certiorari jurisdiction to review a state court's judgment."). The court declined to accept SABIC's attempted submission on grounds of Delaware procedure and standards of appellate review, not by determining the artificial question of federal common law SABIC presents in the petition. Pet. App. 91a-92a & n.4 (citing DEL. SUPER. CT. CIV. R. 60(b) (relating to motions for relief from judgments), and *Bata* v. *Bata*, 170 A.2d 711, 714-716 (Del. 1961) (rejecting untimely filing of foreign-law authority)). Indeed, SABIC expressly recognized that the court had rejected its submission on state-law proce-

dural grounds. Pet. App. 96a ("This Court's determination that the submission was 'procedurally improper,' slip op. at 18, is erroneous.").

SABIC's argument in support of its submission was premised on the Delaware Supreme Court's discretion under Delaware procedural and evidentiary rules to permit the submission—discretion that inherently authorized that court to deny SABIC's motions on independent state-law procedural grounds. In addition to SABIC's misuse of Delaware evidentiary rules, SABIC also violated Delaware's rule against argumentative filings without leave of court because its motion for acceptance of the study, Pet. App. 99a, 101a, contained substantive argument condemning the superior court's Saudi-law rulings and was filed without the leave of court required by Delaware procedure. Pet. App. 15a; DEL. S. CT. R. 15(a)(vi) ("No other brief or writing [*i.e.*, other than opening, answering, and reply briefs] containing argument may be submitted without leave of Court."). The court noted that "depriv[ing] ExxonMobil of their fundamental procedural right to test SABIC's new submissions" would be especially inappropriate given SABIC's failure to avail itself of Delaware posttrial procedures for submitting relevant newly obtained material. Pet. App. 92a & n.5. The court simply never addressed any issue of federal law, making review by this Court jurisdictionally improper.

II. THE DELAWARE SUPREME COURT'S DENIAL OF SABIC'S MOTIONS PRESENTS NO CONFLICT OF AUTHORITY.

Even if SABIC had preserved the question presented, review would still be unwarranted because the petition presents no conflict among the circuits and state supreme courts; no court, state or federal, has ever adopted the new rule SABIC now asserts should be recognized as federal common law. In asserting a conflict between the Delaware Supreme Court's denial of its motions and the "rule" applied

in other courts, Pet. 14, SABIC misrepresents both the nature of the Delaware Supreme Court's ruling and the case law on which SABIC purports to rely. SABIC simply invents a previously unknown federal common-law umbrella in an improper attempt to pin a federal label on what is so obviously a state-law determination. Indeed, even to state its alleged conflict, SABIC must: (1) misconstrue rule 44.1, which is plainly discretionary on its face, as mandating that federal district courts consider and defer to a litigant's representation of a foreign government's views, without regard for procedural or authentication issues; (2) erroneously extend the rule's new-found mandatory nature to appellate review, thereby displacing traditional rules limiting the appellate evidentiary record to matters presented in the district court;[7] and (3) further expand the rule to displace all state procedural rules by fabricating a federal common-law theory supposedly grounded in international comity concerns.

At bottom, SABIC has not identified, and cannot identify, a single case requiring a federal court to receive on appeal and defer to a statement like the one SABIC submitted, let alone a single decision displacing a state court's procedural rules by imposing such a mandatory rule on them.

A. There Is No Conflict Because Federal Law Does Not Require Courts to Accept Appellate Submissions Criticizing a Judgment.

For nearly forty years, federal district courts, like most state courts, have been empowered to employ broad discretion in determining questions of foreign law. The enactment

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[7] In stating its proposed rule as merely requiring all courts to "receive and consider" statements purporting to represent the views of a foreign sovereign, Pet. 24, SABIC attempts to sugarcoat the fact that its proposed federal common-law rule would supersede all generally applicable state-law procedures governing the determination of foreign law in both the trial courts and on appeal.

of rule 44.1 effected a procedural change freeing federal courts from former practice that required foreign law to be proved as a matter of evidentiary fact and that often looked to state rules in determining the content of foreign law. See FED. R. CIV. P. 44.1 advisory committee's note; Arthur R. Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 613, 654-656 (1966-67). The amendment expanded the federal district courts' discretion to evaluate materials in determining foreign law, but there is no indication that the amendment was mandated or prompted by federal common law. Nor can the rule reasonably be interpreted to impose, even on the federal courts, the new constraint SABIC urges—that is, mandating that a court accept and consider a foreign sovereign's made-to-order statement supporting its instrumentality's legal position to the exclusion of other sources of information like expert testimony and independent research. See *Karaha Bodas Co.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (CA2 2002) (considering foreign sovereign's official statement in conjunction with other factors); *Access Telecom, Inc.* v. *MCI Telecomms. Corp.*, 197 F.3d 694, 714 (CA5 1999) (same); *In re Oil Spill by Amoco Cadiz*, 954 F.2d 1279, 1312 (CA7 1992) (same).

The uniform procedure rule 44.1 imposes on federal courts is expressly phrased in flexible, discretionary terms. Federal district courts "*may* consider *any* relevant material or source." FED. R. CIV. P. 44.1 (emphasis added). The drafters' primary intent was to free federal courts to take a highly adaptable approach to the often vexing task of determining the content of foreign law. See FED. R. CIV. P. 44.1 advisory committee's note ("[T]he court is not limited by material presented by the parties . . . . On the other hand, the court is free to insist on a complete presentation by counsel."); Miller, *supra*, at 657 ("[T]he trial judge's freedom of inquiry no longer is encum-

bered by restraints on his research or by the rules of admissibility.").

SABIC now asserts some courts have recognized its alleged rule requiring a court to accept a foreign sovereign's purported explanation of its law—even if it is first received on appeal and regardless of authentication or procedural issues. But that assertion finds no support in any case SABIC cites. For example, SABIC mischaracterizes *United States* v. *Pink*, 315 U.S. 203 (1942), as an example in which "this Court gave effect to an official declaration of Soviet law even where it was obtained after trial in a U.S. state court." Pet. 17. In fact, the Soviet declaration was obtained in November 1937, months before the New York trial court granted summary judgment (there was no trial) in June 1938. *Pink*, 315 U.S., at 214-215, 218-219. "[T]hough it was not a part of the record," the declaration was properly before the lower court, having been properly tendered under New York procedure. *Id.*, at 220-221. Moreover, the Soviet declaration, obtained "through diplomatic channels," was "of unquestioned authenticity and authority." *Id.*, at 218, 221. Importantly, far from holding that federal common law required the New York courts to defer to the Soviet declaration, *Pink* deferred to the State's own rules for such submissions. *Id.*, at 221 ("We can take such notice of the foreign law as the New York court could have taken."). Only after determining that the declaration was properly before the state court under its own procedures did the Court consider the declaration in deciding the distinct federal question at issue. See *id.*, at 217-218. By contrast, this case involves no assertion of federal rights, only rights arising under Saudi law and adjudicated in the state-court forum SABIC chose.

The remaining cases SABIC cites in its attempt to divine a federal common-law rule are also unavailing because they involve neither evidentiary submissions made for the first time on appeal nor federal common law. In *In re Oil Spill by*

Amoco Cadiz, the Seventh Circuit elected to give "substantial" deference to the views of the Republic of France. 954 F.2d, at 1312. But France was a party to that case; there was no question that its authentic, official views were properly before the court; and France "ha[d] taken [its] position since the moment it served the *mise en demeure* in 1978, and it ha[d] reiterated the view in domestic disputes." *Ibid.* Similarly, SABIC's other cases involve federal courts giving discretionary consideration to official views that were properly authenticated in the normal course of litigation and buttressed by additional indicators of reliability. See *Karaha Bodas Co.*, 313 F.3d, at 92 (stating that, "although they do not command" deference, the views of Indonesia asserted in its role as a party to the appeal "furnishe[d] legitimate assistance" in making "a choice between two interpretations of ambiguous foreign law" that "rest[ed] finely balanced"); *Access Telecom*, 197 F.3d, at 714 (noting that federal courts "*may* defer to foreign government interpretations" (emphasis added) and explaining that "we do not feel *compelled* to credit the [Mexican Secretary of Communications and Transportation's] determinations without analysis" (emphasis added)). In short, SABIC's assertion that a federal court would defer to its unauthenticated, untimely study "[w]ithout question," Pet. 18, is a naked claim with no support in federal practice.

B. There Is No Conflict Because No Court Has Ever Held That Federal Common Law Preempts State Procedures for Determining Foreign Law.

Central to SABIC's petition is the assertion that international-comity concerns and the federal common law they supposedly generate not only modify the normally discretionary application of rule 44.1 in federal courts, but also preempt all state-law procedural rules touching on the interpretation of foreign law. Only by making that argument can SABIC even attempt to paint the Delaware Supreme Court's procedural

application of its own rules as a federal issue within this Court's jurisdiction. But no court has ever so held. The fact that different states hypothetically may have interpreted their own procedural rules differently from one another or from the federal courts' interpretation of the federal rule is simply a result of parallel rules in different court systems and does not in the least create a conflict of authority. See *Florida* v. *Casal*, 462 U.S. 637, 639 (1983) (Burger, C.J., concurring); cf. *Jankovich* v. *Ind. Toll Road Comm'n*, 379 U.S. 487, 491-492 (1965) ("[E]ven though a state court's opinion relies on similar provisions in both the State and Federal Constitutions, the state constitutional provision has been held to provide an independent and adequate ground of decision."); *Nat'l Capital Naturists, Inc.* v. *Bd. of Supervisors*, 878 F.2d 128, 133 (CA4 1989) ("The fact that language in a state constitution may parallel that in the United States Constitution is no reason to suppose that the lines of decisional authority under those provisions will invariably be identical."). Not surprisingly, then, SABIC carefully avoids representing that any court has ever recognized the common-law principles it asserts.

Effectively conceding that its imagined federal common-law rule has no actual foundation in federal practice, SABIC resorts to a patchwork of generic quotations about international comity in an attempt to suggest the proposed rule's inevitability. That attempt fails. "There is no federal general common law." *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938). "[C]ases in which judicial creation of a special federal rule would be justified" are "few and restricted, limited to situations where there is a significant conflict between some federal policy or interest and the use of state law." *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 87, 80 (1994). Restored to their context, the axioms on which SABIC relies demonstrate no conflict between federal policy and the traditional prerogative of the States to establish their own procedures for determining foreign law.

It is well established that consideration of international comity may inform U.S. courts' analysis of questions affecting foreign sovereigns. See, *e.g.*, *Societe Nationale Industrielle Aerospatiale* v. *United States Dist. Court*, 482 U.S. 522, 546 (1987); *Hilton* v. *Guyot*, 159 U.S. 113, 163-164 (1895); *The Schooner Exchange* v. *M'Faddon*, 11 U.S. (7 Cranch) 116, 135 (1812). But comity is not "a matter of absolute obligation." *Hilton*, 159 U.S., at 163-164. Rather, "the doctrine of international comity is best understood as a guide where the issues to be resolved are entangled in international relations." *In re Maxwell Communication Corp.*, 93 F.3d 1036, 1047 (CA2 1996); accord, *e.g.*, *Bigio* v. *Coca-Cola Co.*, 239 F.3d 440, 454 (CA2 2000) (describing discretionary applications of comity). It has never been suggested by any court that those discretionary guiding principles require federal procedures for determining questions of foreign law to displace those long employed by the several States. Indeed, the history of rule 44.1 demonstrates the federal judiciary's presumption that the States will continue to employ their own rules for determining foreign law. See FED. R. CIV. P. 44.1 advisory committee's note (implicitly assuming that the States will continue to employ their own procedures for determining foreign law); Miller, *supra*, at 702-731 (same).[8]

SABIC puts misplaced reliance on cases involving discovery burdens, see *Societe Nationale Industrielle Aerospatiale*, 482 U.S., at 546, personal jurisdiction, see *Asahi Metal Indus. Co.* v. *Superior Ct.*, 480 U.S. 102, 115 (1987), and the act of state doctrine, see *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427 (1964). Of those cases, the only one that involved a foreign sovereign's statement of law was *Societe Nationale Industrielle Aerospatiale*, which rejected the official position taken by the Republic of France. 482 U.S., at

[8] In fact, it was suggested that *Erie* required federal courts to continue following state practice in diversity cases. See Miller, *supra*, at 702-731.

529. None articulated a specific federal policy that conflicts with the application of state rules for determining foreign law.

C. There Is No Conflict Because the Delaware Supreme Court's Denial of SABIC's Motions Does Not Conflict With the Federal Courts' Application of Rule 44.1.

Even if it were possible to suggest that federal law somehow dictates the application of Delaware's evidentiary and procedural rules governing the determination of foreign law, there can still be no conflict in this case because Delaware practice is squarely in line with the majority view, and the Delaware courts' disposition of the foreign law issues was an unremarkable application of that practice on the particular facts of this case. In its attempt to create a conflict out of whole cloth, SABIC invokes a false dichotomy equating its imaginary rule with the treatment of foreign law as a question of law. SABIC incorrectly posits that the Delaware Supreme Court, by declining to accede to SABIC's desire to have conclusive effect given to its procedurally improper evidentiary submission, has placed Delaware alongside the minority of States purporting to view the determination of foreign law as a question of fact. That sleight of hand cannot transform this case into an appropriate vehicle for resolving any conflict that might exist (notwithstanding SABIC's failure to demonstrate it) over treatment of foreign law in U.S. courts.

Like the federal and most state courts, Delaware trial courts are empowered with broad discretion in gathering information on foreign law. See DEL. R. EVID. 202(e) ("The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under these rules."); DEL. SUPER. CT. CIV. R. 44.1 (same); *Annan* v. *Wilmington Trust Co.*, 559 A.2d 1289, 1293-1294 (Del. 1989); *Judah* v. *Del. Trust Co.*, 378 A.2d 624, 631 (Del. 1977). That discretion to "consider any

relevant material" necessarily includes, when appropriate, discretion to consider properly authenticated official statements of law. As in the federal and most state courts, "[t]he court's determination shall be treated as a ruling on a question of law," DEL. SUPER. CT. CIV. R. 44.1; DEL. R. EVID. 202(e), and is subject to de novo review. See *J.S. Alberici Constr. Co.* v. *Mid-West Conveyor Co.*, 750 A.2d 518, 520 n.2 (Del. 2000); accord *Judah*, 378 A.2d, at 631. The Delaware Supreme Court did nothing in this case to alter Delaware's longstanding agreement with most U.S. jurisdictions regarding the treatment of foreign law. See Pet. App. 42a ("To the extent SABIC contends that the Superior Court made incorrect determinations of Saudi law or instructed the jury incorrectly on issues governed by Saudi law, such determinations and jury instructions are treated as rulings on a question of law and are subject to *de novo* review.").

The Delaware Supreme Court grounded its denial of SABIC's motions entirely in procedural noncompliance, not in any claimed right to ignore the pronouncements of a foreign sovereign. There is no support anywhere in the record for SABIC's false assertion that the Delaware Supreme Court has adopted a rule categorically rejecting consideration of a foreign sovereign's statement that is submitted for the first time on appeal. See Pet. 19. Had the Kingdom sought to express its views through submission of an amicus brief or in some other procedurally proper way, there is no doubt that the Delaware Supreme Court would have considered its arguments along with the parallel arguments asserted by SABIC, which the court considered de novo. SABIC has no basis to assert that Delaware's application of its own rules on the determination of foreign law differ in any material respect from the federal courts' interpretation of rule 44.1.

III. CREATING FEDERAL COMMON LAW REQUIRING COURTS TO CONSIDER FOREIGN SOVEREIGNS' STATEMENTS WITHOUT REGARD TO PROCEDURAL OR EVIDENTIARY RULES WOULD BE IMPROVIDENT.

SABIC cannot dispute that the Delaware Supreme Court's denial of its motions was a valid application of the Delaware procedural rules with which SABIC utterly failed to comply. Thus SABIC seeks to displace state procedures with a federal common-law rule that would require state appellate courts to consider and defer to foreign sovereigns' explanations of their own law without regard to the States' evidentiary and procedural rules that would otherwise apply. In SABIC's view, no matter how or when such a statement is submitted, a court must accept and consider it.

Such a rule would improperly give entities owned by or otherwise tied to foreign sovereigns a trump card to hold until needed and play on appeal when the nonsovereign (usually U.S.-based) litigant will be unable to test or counter a new submission on foreign law. The rule SABIC seeks would decrease fairness in the process of determining foreign law in American courts with no corresponding increase in accuracy of result. Indeed, it would invite and reward results-oriented gamesmanship and an ad hoc approach to legal interpretation by foreign sovereigns.

The circumstances of this case plainly illustrate the danger in displacing generally applicable state evidentiary and procedural rules with special rules favoring foreign litigants on questions of ascertaining the content of foreign law. It cannot be disputed that neither SABIC nor its amicus ever availed itself of procedurally available opportunities to provide either Delaware court with an authentic official statement of the foreign sovereign's views. Instead—after losing at trial—SABIC solicited the tailor-made "study" for the express purpose of critiquing the Delaware trial court's application of Saudi law. Pet. App. 299a-300a. SABIC never provided the

Delaware Supreme Court anything beyond its ipse dixit to indicate that the study was an "official statement" of the sovereign. SABIC merely attached the study to its motion, never (to this day) disclosing its authorship, and also attached a cover letter purporting to be from the "Acting Assistant Deputy Minister of Justice for Judicial Affairs." Pet. App. 301a-327a. Nowhere does the study claim to be an "official statement" of the Kingdom. Pet. App. 302a-324a. Nor does the cover letter make that claim or disclose the authority or qualifications of the "acting assistant deputy" who signed it. Pet. App. 301a.

SABIC could have sought leave to file its motion for acceptance and attached documentation indicating that the study was an official statement. See Pet. App. 15a; DEL. S. CT. R. 15(a)(vi). It did not. Instead, when respondents challenged the authenticity of the statement, SABIC merely reasserted that the statement was official and smugly suggested that the court could telephone the Saudi government to verify its authenticity. Pet. App. 107a. As the Delaware Supreme Court expressly noted, it was SABIC's complete failure to provide any indicia of its study's official status that meant "an entirely new evidentiary hearing would have been required" before it could have been given any effect. Pet. App. 92a & n.5 (noting that such a hearing would have been "a highly inappropriate result given that SABIC made no effort to seek relief from the judgment under Superior Court Rule 60").

Moreover, the Kingdom could have sought leave to file an amicus brief stating its official views. See DEL. S. CT. R. 28. It did not. Nothing indicates that the Delaware Supreme Court would have denied leave had it been properly requested under its rules. SABIC did not even make a serious effort to assert the official views of the Kingdom in its own brief in the Delaware court.

Now, having ignored every proper procedure for putting the Kingdom's views before the Delaware Supreme Court, SABIC asks this Court to create federal common law ousting the state courts' generally applicable local procedures for determining foreign law whenever a foreign litigant seeks to inject a document that it asserts represents the views of the foreign sovereign whose law is involved. There is nothing inequitable in holding foreign litigants to the same rules that other litigants are expected to observe, and there is no international-comity or fairness interest in granting a free pass in U.S. courts to litigants aligned with foreign sovereigns. The Court should decline SABIC's invitation to federalize the Delaware Supreme Court's application of its rules of procedure and standards for appellate review. Under the circumstances, the Delaware Supreme Court's actions were entirely justifiable and unremarkable, and a federal common-law rule requiring state appellate courts to ignore the procedural and evidentiary deficiencies of SABIC's motions would be grossly unfair.

CONCLUSION

For these reasons, the Court should deny the petition.

Respectfully submitted,

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IN THE

Supreme Court of the United States

SAUDI BASIC INDUSTRIES CORPORATION,
Petitioner,

v.

MOBIL YANBU PETROCHEMICAL COMPANY, INC., AND EXXON CHEMICAL ARABIA, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

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REPLY BRIEF FOR THE PETITIONER

The petition demonstrates that the Delaware Supreme Court's refusal to consider an official statement from the Saudi Ministry of Justice explaining the content of Saudi law conflicts with the rules for establishing foreign law followed by the federal and most other state courts. SABIC contends that it also violates principles of international comity that bind all courts in the United States as a matter of federal law. This case squarely presents that important federal question, and this Court should grant review.

1. ExxonMobil devotes much of its opposition to attacking straw men. Nothing in the petition suggests, for example, that courts should proceed "without regard for procedural or authentication issues." Opp. 13. Nor does SABIC ask this Court to "supersede all generally applicable state-law procedures governing the determination of foreign law in both the trial courts or on appeal"; to "displac[e] traditional rules limiting the appellate *evidentiary* record to mat-

ters presented in the district court"; to "displace all state procedural rules"; or to "preempt all state-law procedural rules touching on the interpretation of foreign law." Opp. 13 & n.7 (emphasis added), 16; *see also* Opp. 16-19, 21, 23.

SABIC seeks enforcement of a limited but important rule of judicial comity: When a court in the United States is deciding a matter of foreign law, it must receive and give respectful consideration to an official statement from the relevant foreign sovereign explaining that law, even if the statement first becomes available on appeal. That rule need not call into question any reasonable state procedural rule at either the trial or the appellate level.[1] It does not require a court to ignore questions about the authenticity or authority of a submission—although only reasonable questions could properly affect the weight accorded to a submission. It does not require that a foreign sovereign's statement be considered "to the exclusion of other sources" (Opp. 14), or be given "conclusive effect" (Opp. 19).[2] The rule precludes only what the Delaware Supreme Court did here: refusing to

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[1] SABIC has no reason to contend that a foreign sovereign's statement must be considered "no matter how or when" it is submitted (Opp. 21). It suffices that an appellate court may not refuse to consider such a statement solely because it was not submitted first to the trial court. *Cf. Stuart* v. *United States*, 813 F.2d 243, 250-251 (9th Cir. 1987) (declining to consider materials on foreign law proffered for first time *after oral argument*), *rev'd on other grounds*, 489 U.S. 353 (1989). SABIC submitted the Saudi Ministry's statement to the Delaware Supreme Court before the case was briefed in that Court. As explained below (at 3, 7-8) and in the petition (at 16-18), that procedure would have been perfectly acceptable under Federal Rule of Civil Procedure 44.1. Until the decision in this case, there was no reason to think that the applicable Delaware rules would be interpreted any differently. *See, e.g., Apartment Communities Corp.* v. *Martinelli*, 859 A.2d 67, 70-71 (Del. 2004) (Delaware rules are "almost identical" to federal rules and their construction is "greatly influenced by the federal judiciary's construction of the Federal Rules of Civil Procedure").

[2] Even a rule of deference—which might well be appropriate, although the Court would not need to reach the issue in this case (*see* Pet. 16 n.6)—would not require that courts invariably treat a foreign sovereign's statement as "conclusive."

consider a foreign sovereign's statement *at all* as relevant authority on points of foreign *law*, solely because the statement was not presented first to the trial court or tested as though it were evidence of disputed *facts*.

2. Contrary to ExxonMobil's claim (Opp. 9, 10-11), the federal question raised by the petition was presented first to the Delaware Supreme Court. In submitting the Ministry's statement, SABIC of course cited the relevant Delaware rules—which, as ExxonMobil notes (Opp. 10 n.6), are squarely based on Federal Rule of Civil Procedure 44.1. As the petition explains (at 12), however, SABIC also relied on federal authorities that address both (i) the comity requirement that courts respectfully consider foreign sovereigns' statements about their laws and (ii) the consideration properly accorded to materials that can help resolve questions of foreign law and that become available for the first time on appeal. *See* Pet. App. 96a, 101a-102a, 105a-106a, 108a-110a, 115a-116a.

Most significantly for present purposes, when SABIC asked the Delaware Supreme Court either to consider the Ministry's statement or to remand the case to the trial court for further proceedings, it argued—citing only federal authority—that as "the official statement of a sovereign nation" the Ministry's statement was "entitled to respect, comity, and 'substantial deference' from the courts *of the United States*," including the courts of Delaware. Pet. App. 120a (emphasis added); *see also id.* at 102a, 108a ("Saudi Arabia is a sovereign nation, acting through its government, and its expressions of its own legal principles are entitled to respect and comity."), 115a-116a, 121a ("Comity dictates [a remand] here in view of the Saudi Government's statement of [Saudi] law."). Those arguments were renewed—not offered for the first time (Opp. 11)—in SABIC's motion for reargument. Pet. App. 96a-97a ("Thus, the Court should grant reargument, accept the Saudi Government's statement of law as is required by applicable principles of international comity, and rule in SABIC's favor.").

Where they apply, principles of international (rather than interstate) comity are ultimately matters of federal common law. Pet. 20-22. SABIC's motions to consider the Saudi Ministry's statement or remand the case clearly invoked those principles; and the Delaware Supreme Court's "out of hand" denial of the motions made clear that it rejected any role for international comity in this case. Pet. App. 92a; *see id.* at 15a, 61a. No more was required for proper presentation of the federal question raised by the petition. *See New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 66 (1928) ("[n]o particular form of words or phrases is essential").

3. There is likewise no substance to ExxonMobil's suggestion that this Court lacks jurisdiction because the Delaware Supreme Court relied on adequate and independent state-law grounds. Opp. 3, 9, 10-12.

The order denying reargument specifies that the court refused to consider the Saudi statement on two grounds, so closely related that they effectively merge: the statement was not first presented to the trial court, and therefore respondents had no opportunity to "test" it "by discovery and cross examination." Pet. App. 92a; *see id.* at 15a (statement was "never presented to, or considered by, the trial court"), 91a-92a & n.5; *see also* Opp. 11-12; Pet. 12. As the petition explains (at 19), reliance on those grounds makes clear that the Delaware Supreme Court—unlike the federal or most other state courts—will not consider a foreign sovereign's statement about the meaning of its law if the statement is made available for the first time on appeal.

That holding is not "independent" of SABIC's claim here: that federal-law principles of comity *require* all U.S. courts, state or federal, to receive and consider a foreign sovereign's statement as appropriate authority addressing questions of foreign law, *even if* the statement did not become available until after the trial court's decision. Nor are the state court's grounds "adequate" to support its decision in view of that federal claim. There is accordingly no juris-

dictional impediment to this Court's deciding the question presented.

4. ExxonMobil presents its own view of the underlying Saudi law issues (and the litigation in which they arose). *See, e.g.*, Opp. 3-9. The petition explained certain of those issues in some detail so that this Court could understand the context in which the question presented arises and why the answer to that question is important in this case. *See, e.g.*, Pet. 5-14, 25-27. As should be obvious, however, the Court need not consider any issue of Saudi law. The point here is that the Saudi Ministry's statement is valid legal authority that federal comity principles required the *Supreme Court of Delaware* to consider, as part of its "*de novo*" review, before it could hold that "no basis ha[d] been shown to overturn" the trial court's determinations of Saudi law. Pet. App. 42a, 50a.

Of course, SABIC believes that if the Delaware Supreme Court fairly considers the Saudi government's position, it will reverse the trial court's judgment. *See, e.g.*, Pet. 25-27. In *this* Court, however, SABIC seeks only enforcement of the rule of comity that should have impelled the state court to undertake that fair analysis in the first place.

5. ExxonMobil concedes that the state supreme court was "required" to conduct a "thorough de novo review of all Saudi-law issues." Opp. 9. It seeks to defend the court's decision to ignore the Saudi Ministry's statement, while purporting to conduct such a review, on three grounds.

First, ExxonMobil persists in impugning (somewhat paradoxically) both the authenticity of the Saudi Ministry's statement and the Saudi government's motives in preparing it. *See* Opp. 1-2, 9, 10, 21-22. These aspersions were already frivolous and offensive when ExxonMobil first cast them below. *See* Pet. App. 106a-108a. Its decision to renew them now, in the face of the amicus brief submitted by Saudi Arabia in this Court—which was filed and served at the same time as the petition, but which ExxonMobil barely even acknowledges (Opp. 1, 21)—is astonishing. *See* Br. of the Kingdom of Saudi Arabia 7-12.

Second, ExxonMobil now suggests that the state court's refusal to consider the Saudi statement was only a matter of format. It speculates that if SABIC had submitted some additional (although unspecified) "documentation" that the Ministry's statement was authentic (Opp. 22), or if Saudi Arabia had sought leave to file an amicus brief in the state proceedings (Opp. 20, 22), the state supreme court might have taken the Saudi government's views under advisement rather than rejecting them "out of hand" (Pet. App. 92a). ExxonMobil offers no foundation for its musings.[3] In light of these arguments, however, and of the amicus brief filed by Saudi Arabia in this Court, SABIC renews its own suggestion (Pet. 27 n.12) that this Court consider granting the petition, vacating the judgment below, and remanding the case to the Delaware Supreme Court.

Third, ExxonMobil insists at every turn that the decision whether to consider the Saudi Ministry's statement lay within the state supreme court's "discretion." Opp. 2, 10, 12, 14-15, 17-20. On that point, issue is fairly joined. As ExxonMobil concedes, the trial court's holdings on matters of Saudi law were subject to *de novo* review. That means review to determine whether or not the lower court's holdings were *correct* as a matter of law. It does not mean that those holdings could permissibly fall anywhere within some undefined range of discretion. The distinction is critical. The trial court based its charge to the jury on its determinations about the content of Saudi law. The appellate court's task on *de novo* review was to decide whether those determinations, and therefore the jury charge, were correct or incorrect under Saudi law. It makes no sense to argue that in undertaking that task the court had "discretion" to ignore

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[3] The suggestion that foreign sovereigns must proceed by informing themselves about particular disputes, obtaining counsel, and seeking leave to file amicus briefs in order to have their official statements of law accorded respectful consideration by U.S. courts is particularly unrealistic and inappropriate as a matter of comity. *See* KSA Br. 11-12.

new, highly relevant legal authority that would help it get the answer right.

SABIC contends that where, as here, an appellate court in the United States reviews *de novo* questions of foreign law, the court must receive and consider, as relevant legal authority, a statement from the foreign sovereign explaining that sovereign's own laws. Refusal to do so, solely on the ground that the sovereign's statement was not first submitted to the trial court, is a violation of comity and an error of federal law.

6. ExxonMobil cannot refute the petition's demonstration that Delaware's refusal even to consider the Saudi Ministry's statement conflicts with the rule applied in the federal and most state courts. *See* Opp. 12-20.

As the petition explains (Pet. 16-18), a federal court would at least have considered the Ministry's statement. Addressing only three of the cases the petition cites, ExxonMobil argues principally that federal courts would not unquestioningly defer to any submission from a foreign sovereign. *See* Opp. 13-16. SABIC has not claimed that they would. ExxonMobil offers no answer to SABIC's point that a party may properly provide an appellate court, undertaking *de novo* review of a point of law, with authorities or materials not considered by the trial court—or to the federal cases, cited in the petition, that specifically endorse that proposition. *Compare* Opp. 15-16 *with* Pet. 17-18. But ignoring arguments and cases will not make them go away.[4]

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[4] Respondents quibble with our description of *United States* v. *Pink*, 315 U.S. 203 (1942). Opp. 15. The petition cites *Pink* for the proposition that "[b]ecause foreign-law questions are matters of law, a foreign government's statement is valid authority even if it becomes available for the first time on appeal." Pet. 17. The procedural complexities of the case do not undermine that point. Discussing New York law that, like modern federal and Delaware law, treated the substance of foreign law as a matter for the court, *Pink* concluded that it was "clear that [a] New York appellate court has authority to consider appropriate decisions interpreting foreign law even though they are rendered subsequently to the trial." 315 U.S. at 203. This Court took notice of an "official declaration" of Rus-

Similarly, ExxonMobil argues that a refusal to give "conclusive effect" to a "procedurally improper evidentiary submission" does not put Delaware at odds with other States. Opp. 19. But the point here is not that the Delaware Supreme Court gave the Saudi government's views insufficient weight. The point is that the court refused to consider them *at all*, solely because they were presented for the first time on appeal. Pet. 19. The court adopted a minority position precisely in that it treated the official statement conveying a foreign sovereign's explanation of its law as, in respondents' words (Opp. 19), an "evidentiary submission," rather than as supplemental authority on *questions of law*.[5]

7. ExxonMobil concludes (Opp. 21-23) with a collection of policy arguments so threadbare that they only underscore the need for review. No rational litigant, for example, holds relevant authority back from the trial court, secretly hoping that it will lose the case and then be able to play some special "trump card" on appeal. Opp. 21. Compelling new legal authority will surface on appeal only under special circumstances—including where, as here, the trial court's decision makes clear that it has misunderstood the existing authority, and identifies particular issues that need to be further

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sian law that was obtained "[s]ubsequently to the hearings" in an earlier case, the decision in which provided the entire basis for the summary judgment reviewed in *Pink* itself. *Id.* at 214-215, 218, 221. The Court concluded that notice was authorized because New York treated foreign law as a matter of law—even though the official declaration apparently had not been accepted as "part of the record" by the New York courts in *Pink* (despite being "tendered" for consideration), and even though the State's highest court had specifically refused to certify the declaration as part of the appellate record in the earlier case. *Id.* at 220-221 & n.5.

[5] ExxonMobil itself notes (Opp. 14-15) that federal Rule 44.1 was intended to eliminate constraints on a court's "freedom of inquiry" on matters of foreign law that might otherwise be imposed by, among other things, "rules of admissibility" that apply to proof of *facts*. The point of the rule was to provide "flexible procedures" through which the court could reach "a *sound result*" as a matter of law. Fed. R. Civ. P. 44.1, 1966 Advisory Comm. Note (emphasis added).

explained.[6] If at that point new authority reveals the trial court's legal errors, there is no justification for an appellate court, reviewing the matter *de novo*, to refrain from correcting them. Certainly there is no substance to the unexplained assertion that appellate consideration of a foreign sovereign's statement explaining its law will "decrease fairness" without "increas[ing] ... accuracy." *Id.* To the contrary, respectfully considering such a statement can only promote both fairness and accuracy in determining foreign law.

In the end, ExxonMobil falls back on its spurious insinuations about the authenticity or good faith of the Saudi Ministry's statement. *See* Opp. 21-23. That approach only exacerbates the state supreme court's wholly unjustified—and keenly felt—affront to the government of a foreign sovereign. *See* KSA Br. 7-12. The resulting damage to international comity nicely illustrates why the Delaware Supreme Court's refusal to consider the Saudi government's statement was an error of federal law. As the petition demonstrates (at 27-29), that error is of general (and increasing) importance in a time of ever-greater internationalization of the commercial disputes that courts in this country are called upon to resolve. It warrants review, and the provision of clear guidance, by this Court.

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[6] As SABIC explained to the Delaware Supreme Court when it first submitted the Ministry's statement (*see* Pet. App. 100a-101a), in this case SABIC requested a statement of law from the Saudi Ministry after trial in light of the trial court's surprising interpretation of the expert testimony, and the court's expressed frustration with the lack of official authority.